

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD LEHMAN on behalf of himself and others similarly situated,

Case No. C13-1835RSM

Plaintiffs,

V.

ORDER GRANTING IN PART
PLAINTIFFS' SECOND MOTION FOR
ATTORNEYS' FEES AND EXPENSES

WARNER NELSON; WILLIAM BECK, JR.; BRIAN BISH; KLAAS A. DeBOER; MICHAEL G. MARSH; ROCKY SHARP; RICHARD BAMBERGER; DENNIS CALLIES; CLIF DAVIS; TIM DONOVAN; HARRY THOMPSON; GARY YOUNGHANS; CLINT BRYSON; MICHAEL CHURCH; MICHAEL DOYLE; GREG ELDER; GLEN FRANZ; GARY GONZALES; CARL D. HANSON; PATRICK POWELL; GARY PRICE; SCOTT STEPHENS; ROGER TOBIN; and GRANT ZADOW, in their capacity as Trustees of the IBEW Pacific Coast Pension Plan,

Defendants.

This matter comes before the Court on Plaintiffs' second Motion for Attorneys' Fees and Costs. Dkt. #136. Plaintiffs seek a total of \$804,995.50 in statutory attorneys' fees, \$289,276 in Common Fund fees, and \$27,465.69 in costs, as well as \$15,000 and \$5,000 for

ORDER GRANTING IN PART PLAINTIFFS' SECOND MOTION FOR ATTORNEYS' FEES AND EXPENSES - 1

1 class representatives. Dkt. #145 at 10; Dkt. #145-1. The Court has determined that oral
2 argument is unnecessary.

3 The parties are well aware of the procedural history of this case. The Court previously
4 awarded attorneys' fees to Plaintiffs, but granted their request only in part. *See* Dkt. #96. The
5 Court found Plaintiffs' request for the rates of \$665 and \$400 per hour unreasonable, that "[i]n
6 the Western District of Washington, the relevant community for comparison, an analysis of
7 recent ERISA cases reveals that attorney's fees are awarded under 29 U.S.C. § 1132(g)(1) in
8 the range of \$175 to \$300 per hour," and that "[a] search for ERISA class action cases in the
9 Ninth Circuit found attorney's fees in the range of \$295 to \$514.60 per hour were deemed
10 reasonable." *Id.* at 6–7 (citing cases). The Court awarded fees at a combined hourly rate of
11 \$350, basing this decision both on Plaintiffs' "absence of proper evidence" and "the Court's
12 own review of comparable cases." *Id.* at 7. The Court also cut certain billed time as improper,
13 found that no lodestar multiplier was warranted, and made other related rulings. The Court
14 awarded \$10,000 to the named Plaintiff in this case. *Id.* at 14–15.

15 Plaintiffs appealed the Court's decision as to the \$350 rate, and other rulings from a
16 prior substantive Order. Dkt. #106. Notably, neither party appealed the Court's decisions
17 regarding the Court's calculation of the reasonable number of hours expended nor the
18 appropriateness of the common fund award. The Ninth Circuit issued its Opinion on July 14,
19 2017, Dkt. #112. That Opinion remanded certain issues back to the Court for consideration. In
20 the only section relevant to the instant Motion, the Ninth Circuit stated: "[t]he plaintiffs contest
21 only the district court's determination of a reasonable hourly rate. Because we reverse the
22 district court's order awarding damages with respect to Amendment 24, we also vacate the
23 attorneys' fees award." Dkt. #112 at 37. The Ninth Circuit did not weigh in on the Court's
24
25
26
27
28

1 analysis. In a footnote, the Ninth Circuit stated “[t]o provide clarity on remand, we note that
2 the district court did not abuse its discretion by ruling that the relevant legal community for
3 purposes of calculating the fee award was the Western District of Washington because that is
4 the forum in which the district court sits.” *Id* at 37 n.8.

5 Attorneys’ fees and costs are warranted for Plaintiffs in this case, as they have prevailed
6 and obtained all relief sought. *See* 29 U.S.C. § 1132(g)(1); Dkt. #96 at 2–4. The legal basis
7 and test used by the Court for calculating fees has already been set forth in detail in the Court’s
8 prior Order on attorneys’ fees, Dkt. #96. This time around, Plaintiffs submit significantly more
9 factual and legal support for their requested rates of \$665 for attorney Richard Birmingham,
10 \$460 for attorney Joseph Hoag, and \$385 for attorney Christine Hawkins. Dkts. #138–141.
11 Specifically, the declarations of attorneys Cliff Cantor, Derek W. Loeser, and Richard E.
12 Spoonemore are from attorneys practicing this type of law in this legal community, and they
13 support the requested rates. Dkts. #139–141. Defense counsel declarations demonstrating that
14 they charge significantly lower rates are not dispositive, as the work performed by Plaintiffs’
15 counsel in this case differed in complexity and risk. The parties also duel over awarded rates in
16 comparable cases, however many of the ERISA cases cited by Defendants for lower awarded
17 rates are not comparable because they involved individual plaintiffs or were otherwise not as
18 complex as this one. The Court finds that Plaintiffs have submitted satisfactory evidence to
19 support their requested rates. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945–46 (9th Cir.
20 2007); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)
21 (“Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the
22 community, and rate determinations in other cases, particularly those setting a rate for the
23 plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.”). Although the
24
25
26
27
28

1 Court previously awarded Plaintiffs a lower rate of \$350, the Court is not aware of any legal
2 basis to hold Plaintiffs to that rate from a vacated award, in the process ignoring the additional
3 evidence provided by Plaintiffs.

4 Plaintiffs request rates of \$275 and \$255 for paralegals Jennifer Cygnor and Renee
5 March, respectively. Defendants argue that these rates are excessive, and that “even the cases
6 cited by Plaintiffs showed support staff rates at \$180 per hour.” Dkt. #144 at 4 (citing *Griffith*
7 *v. Providence Health Servs., Ret. Plans Comm. et al*, No. 14-cv-01720-JCC (W.D. Wash.
8 2017)). Plaintiffs do not address their paralegal rates in their Motion, and only in a footnote on
9 Reply, noting that the paralegal rate of \$220 was awarded in *Stewart v. Snohomish Cty. Pub.*
10 *Util. Dist. No. 1*, 2017 WL 4538956, at *1 (W.D. Wash. Oct. 11, 2017). The Court finds that
11 Plaintiffs have submitted insufficient evidence to support their requested rates, and will reduce
12 this rate to \$220 per hour for all paralegal work, a rate that is higher than the majority of rates
13 mentioned by the Court in *Stewart*. There were 22.2 paralegal hours billed for a total of \$6,005
14 dollars. *See* Dkt. #146-1 at 73. At the new rate, this would be \$4,884 dollars. Accordingly,
15 \$1,121 will be subtracted from the total.
16
17

18 With regard to the number of hours Plaintiffs are requesting, they state:
19
20

21 This Court previously found that Class Counsel had appropriately
22 expended 766 hours of time through May 28, 2015. Dkt. No. 96 at
23 12. Neither party objected to or appealed that finding, and the
24 Court should reaffirm its prior conclusion regarding hours
25 reasonably expended through May 28, 2015. On appeal, Class
26 Counsel expended approximately 535 hours on multiple issues and
27 cross-appeals. As a result, the Ninth Circuit affirmed that Pacific
28 Coast Plan amendments did not nullify ERISA rights under the
Reciprocity Agreement and that earnings on improperly withheld
contributions should be transferred, and vacated the prior attorney
fee award. These rulings directly relate to remand proceedings
before this Court. On remand, Class Counsel engaged in
dispositive and other motions practice, discovery, and damages
analysis and calculations. Class Counsel’s total hours incurred as

1 of April 19, 2018 is 1,687.2. From this total, the Class voluntarily
2 deducts 221.6 hours as primarily attributable to the Common Fund
3 recovery, Birmingham Decl., ¶ 4, for a total of 1,465.6 hours
4 sought under 29 U.S.C. § 1132(g)(1), Birmingham Decl., ¶ 5 &
5 Ex. A.

6 The Court generally agrees with this analysis. However, the Court has identified certain billing
7 entries that will be trimmed or cut entirely, consistent with the Court's prior review of
8 Plaintiffs' billing records up until May 28, 2015. These entries are listed below, with brief
9 explanations by the Court.

Date	Professional	Time	Amount	Description of Services
7/21/15	C. Hawkins	0.3	115.50	Finalize and file notice of additional authority
7/21/15	J. Hoag	0.1	46.00	Receive and review filing
7/21/15	R. Birmingham	0.4	266.00	File supplemental authority

10 These entries are duplicative of each other and reflecting only the administrative task of
11 filing a brief with the Court. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76
12 L. Ed. 2d 40 (1983). The Court will cut the entries for Attorneys Hoag and Birmingham and
13 deduct \$312 from the total award.

Date	Professional	Time	Amount	Description of Services
7/7/15	R. Birmingham	0.5	332.50	Conference with J. Hoag on mediation and claimants' appeal
8/28/15	C. Hawkins	0.3	115.50	Correspondence with R. Birmingham and J. Hoag regarding appellate procedures (0.30)...
8/28/15	J. Hoag	0.4	184	...confer and strategize with Mr. Birmingham regarding the same (0.40)...
11/17/15	C. Hawkins	0.5	192.5	...confer with R. Birmingham regarding revised appellate brief (0.50)
11/20/15	J. Hoag	0.6	276	...confer and strategize with R. Birmingham regarding response/cross-appeal arguments and structure (.6)
12/07/15	C. Hawkins	0.3	115.50	Correspondence with J. Cygnor

				and S. Bright regarding corrective actions for combined appellate brief filing
12/9/15	C. Hawkins	0.4	154	Correspondence with S. Bright, R. Birmingham and J. Cygnor regarding preparation of paper copies of combined appellate brief and supplemental excerpt of record for mailing (0.40)...
12/10/15	C. Hawkins	0.3	115.50	Correspondence with J. Cygnor regarding creation of excerpt of record for opening appellate brief (0.30)...
12/18/15	C. Hawkins	0.6	231	Correspondence with J. Cygnor and S. Bright regarding citation authority (0.40)... correspondence with J. Cygnor regarding preparation of appendix to brief (0.20)
12/22/15	C. Hawkins	0.4	154	correspondence with J. Hoag regarding attorney fee motions and orders (0.40)
1/11/16	C. Hawkins	0.2	77	Correspondence with S. Bright and J. Jill regarding preparation of paper copies of brief and filing requirements
1/13/16	C. Hawkins	0.3	115.50	Correspondence with R. Birmingham regarding request for streamlined extension for reply appellate brief
2/10/16	C. Hawkins	0.4	154	Confer with R. Birmingham regarding reply in support of cross appeal (0.40)...
2/12/16	C. Hawkins	0.2	77	Correspondence with J. Hoag and R. Birmingham regarding revisions to reply in support of cross appeal
2/13/16	C. Hawkins	0.2	77	Correspondence with J. Hoag and R. Birmingham regarding revisions to reply in support of cross appeal
2/23/16	C. Hawkins	0.2	77	Correspondence with R. Birmingham regarding reply in support of cross appeal
3/23/16	C. Hawkins	0.4	154	Strategize with J. Hoag regarding reply brief and

ORDER GRANTING IN PART PLAINTIFFS' SECOND MOTION FOR ATTORNEYS' FEES AND EXPENSES - 6

1				authority for position that national rates are appropriate for ERISA litigation cases	
2	3/25/16	J. Hoag	0.2	92	Confer with R. Birmingham regarding reply brief for attorney's fees
3	4/15/16	C. Hawkins	0.2	77	Conference with R. Birmingham regarding revisions to reply brief
4	7/28/17	J. Hoag	0.2	92	Confer with R. Birmingham and C. Hawkins regarding motion to Ninth Circuit pertaining to fees
5	9/17/17	C. Hawkins	0.2	77	Correspondence with J. Hoag and R. Birmingham regarding motion for summary judgment
6	10/26/17	J. Hoag	0.2	92	Confer regarding reply filing issues and content
7	1/31/18	C. Hawkins	0.3	115.50	...email with J. Hoag and R. Birmingham regarding same (0.30)
8	1/31/18	C. Hawkins	0.3	115.50	Email with J. Hoag and R. Birmingham regarding opposition to motion for reconsideration (0.30)...
9	2/7/18	C. Hawkins	0.2	77	Email with S. Bright, J. Hoag and R. Birmingham regarding filing of opposition to motion for reconsideration
10	3/3/18	C. Hawkins	0.3	115.50	...email with J. Hoag regarding same (0.30)
11	3/5/18	C. Hawkins	0.4	154	...confer with R. Birmingham and J. Leno regarding same (0.40)
12	3/7/18	C. Hawkins	0.6	231	Confer with R. Birmingham and accounting department regarding damages calculation and earnings rates (0.60)...
13	3/8/18	C. Hawkins	0.5	192.50	Emails with R. Birmingham and J. Hoag regarding damages calculation and review same
14	3/15/18	C. Hawkins	0.5	192.50	...telephone conference with R. Birmingham regarding same (0.30); email with J. Hoag and R. Birmingham regarding review of draft documents (0.20)
15	3/26/18	C. Hawkins	0.2	77	Email with S. Bright regarding stipulated motion for damages

				filing	
1	3/28/18	C. Hawkins	0.4	154	telephone conferences with R. Birmingham and J. Hoag regarding fee allocation (.40)
2	5/16/18	C. Hawkins	0.3	115.50	Strategize with J. Hoag and R. Birmingham regarding reply in support of motion for fees
3	5/23/18	C. Hawkins	0.3	115.50	Emails with S. Bright regarding documents received in response to discovery requests

7 The above entries reflect intra-office conferences or communications between
 8 experienced counsel. The Court has previously stated that such entries, absent persuasive
 9 justification by the moving party, may be excluded from an award as unnecessary and
 10 duplicative. Dkt. #96 at 8 (citing *Welch*, 480 F.3d at 949). The Court previously cut billings
 11 for this reason, and the parties did not raise this issue on appeal. This time around, Plaintiffs
 12 provide limited, generalized argument to support billing for intra-office conferences, but do not
 13 point to specific entries. *See* Dkt. #136 at 11. The actual billing records are vague. The Court
 14 is not persuaded that the significant number of hours billed for intra-office conferences and
 15 correspondence are non-duplicative or otherwise reasonable. The Court will not cut every six
 16 or twelve minute conference, of which there are many in the records. However, the Court will
 17 cut the most-egregiously duplicative and unnecessary billings and deduct \$4,687.50 from the
 18 total award.

22 Next, the Court finds an excessive number of entries related to preparing for oral
 23 argument before the Ninth Circuit. By the Court's calculation, Plaintiffs' three counsel billed
 24 32 entries for preparing for oral argument over five months, 62.7 hours totaling \$36,180.50.
 25 *See* Dkt. #146-1. This is in addition, of course, to the time Plaintiffs' counsel spent *briefing* the
 26 appeal. The Court is aware from the Ninth Circuit's website that oral argument lasted less than
 27 an hour. Plaintiffs do not justify this time or mention it in their request for fees. "The party

1 seeking fees bears the burden of documenting the hours expended in the litigation and must
2 submit evidence supporting those hours..." *Welch*, 480 F.3d at 945-46 (citing *Hensley*, 461 U.S.
3 at 433). The court excludes those hours that are not reasonably expended because they are
4 "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. The Court finds
5 that this amount of billing was excessive and unnecessary. The billing reflects a duplication of
6 efforts between the three counsel, including having the associates attend oral argument when
7 they were not arguing, and having associates participate in an unexplained moot court version
8 of the oral argument. Erring on the side of caution, the Court will reduce the award for this
9 time by 33%, and deduct \$11,939.57 from the total award.

10
11 In addition to the Court's own observations, Defendants argue that the Court should
12 trim hours for three activities: 1) Plaintiffs' Motion for Reconsideration on the original
13 Attorney's Fees Order, 2) hours spent briefing "national rates and rates under the *Laffey* matrix
14 to the Ninth Circuit, and 3) a request to the Ninth Circuit to provide supplemental authority and
15 supplemental briefing that was denied by that court. Dkt. #144 at 11-14.¹ The Court agrees
16 with Defendants that the majority of these hours cannot be said to be "reasonably incurred"
17 because Defendants continued to argue an inapplicable standard for calculating the appropriate
18 hourly rate, and additionally finds that the hours spent drafting a six-page Motion for
19 Reconsideration were excessive and unnecessary. However, the Motion for Reconsideration
20 was granted in part to correct a "math error" that resulted in \$37,000 of additional funds for the
21 Plaintiffs. *See* Dkt. #145 at 9 (citing Dkt. #105 at 2). This meritorious portion of the briefing
22 took up less than a page. Given all of the above, the Court will trim half of the billing for the
23
24
25
26

27
28 ¹ The Court acknowledges Plaintiffs' argument that Defendants' Response brief exceeded the 12 page limit and
that these arguments were made beyond the twelfth page. However, the Court finds that Defendants' arguments
were generally begun within the first 12 pages, not including the caption, and that the briefing contained tables that
could easily have been submitted in declarations and will not count against the page limit in this instance.

1 Motion for Reconsideration, \$9,310, and trim the second category of time suggested by
2 Defendants for the same reasons, \$7,960. The third category of time was arguably spent in
3 favor of Plaintiffs' position on appeal and will not be trimmed solely because it was
4 unsuccessful.

5 Total reductions come to \$35,330.07. Subtracting this from the total requested number
6 of \$804,995.50 creates a new loadstar total of \$769,665.43.
7

8 The Court has further considered the factors identified in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975) and finds no reason to adjust the loadstar amount.
9

10 The Court has previously found that Plaintiffs' counsel should be awarded 25% of the
11 common fund. *See* Dkt. #96. Defendants do not object to this request. Dkt. #144 at 15.
12

13 Plaintiffs' expenses of \$27,465.69 are reasonable and unopposed by Defendants.
14

15 Defendants do not oppose the incentive awards of \$15,000 and \$5,000. The Court finds
16 that these awards are reasonable. Class Representative Richard Lehman undertook a risk in
17 initiating this litigation in 2013, and has remained active throughout this case, including appeal.
18 Class Representative Michael Puterbaugh likewise undertook risk by consenting to being
19 named as a second Class Representative. The parties agree that Mr. Puterbaugh's addition to
20 the litigation mooted an issue that Defendants were pursuing before this Court. In light of the
21 Class Representatives' risk and service to the Class, an award of \$15,000 to Mr. Lehman and
22 \$5,000 to Mr. Puterbaugh, payable from the Common Fund, is appropriate.
23

24 Having reviewed the relevant briefing, the declarations and exhibits attached thereto,
25 and the remainder of the record, the Court hereby finds and ORDERS:
26

27 1) Plaintiffs' second Motion for Attorneys' Fees and Costs (Dkt. #136) is GRANTED
28 IN PART as stated above.

ORDER GRANTING IN PART PLAINTIFFS' SECOND MOTION FOR ATTORNEYS' FEES AND EXPENSES - 10

- 2) Defendants, in their capacities as Trustees of the IBEW Pacific Coast Pension Fund, are to cause the IBEW Pacific Coast Pension Fund to pay Class Counsel \$769,665.43 in fees and \$27,465.69 in costs under 29 U.S.C. §1132(g)(1).
- 3) Class Counsel are further to be paid 25% of the Common Fund, or \$289,276, as a reasonable attorneys' fee, which is made up of earnings on contributions that this Court has required Defendants to transfer to the Class Members' home pension funds.
- 4) Class Representative Richard Lehman is to be paid \$15,000 from the Common Fund, and Class Representative Michael Puterbaugh is to be paid \$5,000 from the Common Fund, for their services as Class Representatives.
- 5) Class Counsel is to be further paid 25% of any additional earnings that accrue on the Common Fund on or after December 31, 2017, until the date the Defendants or the Pacific Coast Pension Fund distributes all funds as required by this Order.
- 6) Interest shall accrue and be payable by Defendants on the fees and costs above, from the date this Order is entered until the date Defendants make payment to Class Counsel. Interest shall be calculated as set forth in 28 U.S.C. § 1961.

DATED this 6 day of August, 2018.


RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE